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DEC

# Supreme Court of the United States

OCTOBER TERM, 1931.

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**No. 172.**

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MARINE TRANSIT CORPORATION and TUG "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION,

*Petitioner,*

*against*

LOUIS LOUIS DREYFUS and CHARLES DREYFUS, etc.

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## MOTION OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK AND THE AMERICAN ARBITRATION ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF AMICI CURIAE.

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JULIUS HENRY COHEN,
KENNETH DAYTON,
Counsel for the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., *amici curiae.*

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## NOTICE OF MOTION.

# Supreme Court of the United States

OCTOBER TERM, 1931.

MARINE TRANSIT CORPORATION and TUG "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES DREYFUS, etc.

No. 172.

*Sirs:*

PLEASE TAKE NOTICE that upon the annexed petition and brief we shall apply to the Supreme Court of the United States, at Washington, D. C., on the 7th day of December, 1931, at the opening of the court on that day, or as soon thereafter as counsel may be heard, for permission to the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., to intervene herein as *amici curiae* and to file the accompanying brief.

Dated, November 24, 1931.

Yours, etc.,

JULIUS HENRY COHEN,
KENNETH DAYTON,
Counsel for the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc.,

74 Trinity Place,
New York City.

To:

HORACE L. CHENEY, Esq.,
Counsel for Petitioner, Marine Transit Corp.

GEORGE V. A. MCCLOSKEY, Esq.,
Counsel for Louis Louis Dreyfus, et al.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

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| MARINE TRANSIT CORPORATION and TUG "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION,<br>Petitioner,<br>against<br>LOUIS LOUIS DREYFUS and CHARLES DREYFUS, etc. | No. 172. |

## PETITION FOR LEAVE TO INTERVENE AS *AMICI CURIAE.*

*To the Supreme Court of the United States:*

The petition of the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., respectfully shows to the court:

1. Your petitioner, the Chamber of Commerce of the State of New York, is the oldest commercial or trade body in the United States. Its charter was granted by George III on April 5th, 1768, and was confirmed by one of the first statutes passed by the Legislature of the State of New York, Chapter 30, Laws of 1784. From its incorporation, the Chamber has been an active proponent of the arbitration of commercial disputes and has furnished a

tribunal for the service of the commercial world, including a Court of Arbitration, authorized by the Legislature by Chapter 278 of the Laws of 1874, Chapter 495 of the Laws of 1875.

2. Believing that so long as the common law rules of revocability and against ouster of the jurisdiction of the courts persisted, no satisfactory system of arbitration could be had, the Chamber took steps some sixteen years ago to correct these rules. It caused a study thereof to be made by its counsel, Julius Henry Cohen, which was published under the title "Commercial Arbitration and the Law," and which showed the sources of these rules, their error, and their correction by judicial decision in England, where they had originated. It undertook a campaign for the correction of the law in New York, and in co-operation with a committee of the New York State Bar Association, caused the statute to be drafted which became the New York Arbitration Law, Chapter 275 of the Laws of 1920. It co-operated with the New Jersey State Chamber of Commerce and the New Jersey State Bar Association Committee in the preparation of the New Jersey statute, which was adopted in 1923 (Laws of New Jersey, 1923, Chapter 134). It induced the Committee on Commerce, Trade and Commercial Law of the American Bar Association to undertake the preparation and support of a United States statute and of a uniform state act, and also of treaties to be made between the United States and foreign countries, for the effectuation of arbitration agreements and awards. All of these statutes and treaties were to be substantially similar in principle and form, so that a uniform modern system of arbitration should be made possible. The Chamber organized commercial sentiment throughout the United States in support of the United States Act, more than one hundred and thirty-five commercial organizations giving it their endorsement.

During all these years the Chamber was an active advocate of arbitration, giving advice and assistance to other

commercial organizations who were interested in the subject, advising upon statutes in other states (such as those in Massachusetts and Oregon), entering into reciprocal agreements with chambers of commerce abroad (for example, Buenos Aires, Amsterdam and a number of English chambers), and establishing a reputation of competence in its tribunal which brought to it a great number of international disputes arising out of the war and the depression which followed, including disputes to which foreign governments were parties. In order that the work might be continued on a national scale, it caused the Arbitration Foundation, Inc., to be organized as a membership corporation for that purpose.

3. Your petitioner, the American Arbitration Association, Inc., is a membership corporation of the State of New York, formed in January, 1926, by the consolidation of The Arbitration Society of America, Inc., The Arbitration Conference and The Arbitration Foundation, Inc., above mentioned, all of which were organizations with memberships representative of national commercial interests. Its purpose is the development of a sound system of arbitration throughout the United States and with foreign countries. Since its organization, it has maintained and operated a tribunal in New York for the arbitration of disputes before which are brought a very large number of cases annually, has studied the problems of a large number of trade associations and has advised upon the installation of systems of arbitration, and has organized a national panel of arbitrators, exceeding seven thousand in number and located in more than seventeen hundred cities and towns in the United States, the services of which are available for arbitration by any party. As a part of its work, and furthering the scheme initiated by the Chamber, it has drafted an arbitration statute which it recommends for adoption by the various states. This statute incorporates the principles of the United States and New York acts, but has been improved in the light of growing experience in the practice of arbitration. The

Association gives aid and advice to commercial organizations in various states which wish to secure the adoption of this act, and this statute with slight modifications has been enacted in the following states: Oregon (1925, 1929, 1931), California (1927), Pennsylvania (1927), Louisiana (1928), Connecticut (1929), Rhode Island (1929), New Hampshire (1929), Ohio (1931), Wisconsin (1931).

4. All of the acts mentioned above are parts of a general scheme for the development of arbitration, and it was the purpose of their sponsors to foster a uniform system of arbitration throughout the United States. Accordingly, the problems of the constitutionality, construction and application of the individual acts are of national importance because of the bearing which they have on this national scheme. Since the adoption of the first of the modern statutes in New York, in 1920, the use of arbitration has enjoyed a tremendous growth, and it has been adopted as a system for the settlement of disputes by a great number of trade associations and chambers of commerce, many of which have been assisted and advised in the installation of such systems by your petitioners. The construction and application of the United States Act is of special importance, both for the effect which it may have upon the construction and application of state acts with similar principles and provisions, and because it is the statute to which reference will usually be made when the arbitrations involve controversies between citizens of different states. The interest of the commercial world throughout the United States in the proper construction of the statute is far superior to the interests of any individual litigants in the outcome of a particular proceeding.

Because they have been the sponsors of the modern statutes mentioned above, and have taken the lead in the development of arbitration, your petitioners are vitally concerned in the sound and uniform construction and application of these statutes, and have frequently been granted leave to intervene as *amici curiae,* either separately or jointly, in proceedings which have involved ques-

tions of constitutionality or important questions of construction. By reason of their position in respect to arbitration, your petitioners are generally regarded as the representatives of the commercial world in this field.

5. It is hardly necessary to emphasize the importance of the present case in respect to the usefulness of the United States statute in the general scheme outlined above. The constitutionality of the statute is attacked, and if it is held to be constitutional, then the claim is made that the statute should be so construed as to exclude a very large class of cases which your petitioners believe it was intended to cover. Important questions of construction in respect to procedure are also raised. A decision reversing the Circuit Court of Appeals upon these points would be of the most serious consequence to the continued use of arbitration on a national scale.

6. Your petitioners have no interest in the outcome of the case as between the parties thereto, and have not attempted to present argument upon any point which affects the disposition of this case alone and is not of general importance and interest.

WHEREFORE, your petitioners respectfully request that their petition for leave to intervene in this case and to file the enclosed brief as *amici curiae* be granted.

Dated, November 24, 1931.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE STATE OF NEW YORK and AMERICAN ARBITRATION ASSOCIATION, INC.,

By JULIUS HENRY COHEN,
KENNETH DAYTON,
Counsel.

# Supreme Court of the United States

OCTOBER TERM, 1931.

MARINE TRANSIT CORPORATION and TUG "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION,

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against

LOUIS LOUIS DREYFUS and CHARLES DREYFUS, etc.

No. 172.

## BRIEF FOR THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK AND THE AMERICAN ARBITRATION ASSOCIATION, INC., *AMICI CURIAE.*

### Preliminary Statement.

The interest in this case of the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., as sponsors of the various arbitration statutes and proponents of the development of a sound system of arbitration throughout the United States and with foreign countries, has been sufficiently set forth in the petition. The importance to the cause of arbitration of the questions involved in this case, attacking the constitutionality of the United States statute and seeking to construe it in a very limited manner, have been suggested in the petition and will appear fully from the discussion of the law which follows.

## The Facts.

The facts in the case have been sufficiently set forth in the briefs submitted by the parties so that they need not be discussed in detail here. In substance, a shipment of grain was routed from Ft. William, Ont., for export, via Buffalo and New York. The Marine Transit Corporation undertook to haul it from Buffalo to New York, under an agreement which incorporated the terms of the New York Produce Exchange Canal Grain Charter Party No. 1 (pp. 147-148). This Charter Party No. 1 contained a provision for arbitration before the Committee on Grain of the New York Produce Exchange (p. 156). The bill of lading shows that the grain was shipped from Ft. William, Ontario, "in bond for export" (p. 164).

The Barge "John E. Enright," which carried part of the grain, was sunk while under tow of the Tug "Gerald A. Fagan," owned and operated by the Marine Transit Corporation. The shippers commenced a proceeding in admiralty against the Marine Transit Corporation, the tug and the barge, and subsequently claimed arbitration under Charter Party No. 1. Application for arbitration was granted by the District Court as between the shipper and the Marine Transit Corporation, pursuant to the terms of the contract (p. 28).

While the minutes of the hearings before the Grain Committee of the Produce Exchange are printed at length in the record (pp. 30-146), they are apparently of no importance on the present appeal.

An award was rendered in December, 1929, signed by four out of five members of the Grain Committee, and awarding $23,016 principal, $1,668.66 interest, and $362.50 costs of the arbitration in favor of Dreyfus and against the Marine Transit Corporation (p. 166).

Thereafter, on motion made by Dreyfus, the award was confirmed by the District Court (pp. 211-215).

Subsequently the question of the shipper's right to recover from the claimant or its stipulators on behalf of the Tug "Fagan" was separately considered, and the District Court permitted such recovery (pp. 216-226).

Both decisions were affirmed by the Circuit Court of Appeals, Second Circuit (p. 247).

The petitioner attacks the constitutionality of the United States statute, its construction in respect to confirmation under Sections 8 and 9, its application to this case, the issuance of execution against the stipulator for the tug, and the validity of an award signed only by four of the five arbitrators (petitioner's brief, pp. 6-7).

## The History of the United States Arbitration Act.

A brief statement of the history of the United States statute will serve to explain many of the questions which arise in connection with its constitutionality and its construction, and will save repetition in the subsequent discussion of the law.

As we said in the petition annexed hereto, the United States Act was a part of a general scheme initiated by the Chamber of Commerce for the development of commercial arbitration on a national and international scale, and involving the adoption of substantially uniform acts among the various jurisdictions in this country, and treaties with foreign nations.

The New York act was drafted by a committee of the New York State Bar Association at the request of the Chamber of Commerce. The New Jersey State Chamber of Commerce was interested in a New Jersey act, and in co-operation with the New Jersey State Bar Association, drafted an act with provisions borrowed from the New York statute. Then the Chamber of Commerce induced the Committee on Commerce, Trade and Commercial Law of the American Bar Association to draft a proposed United States Act and a proposed uniform act for

adoption by the states. These were based on the provisions of the New York and New Jersey acts.

Successive drafts of the proposed federal act were submitted by the Committee on Commerce, Trade and Commercial Law to the American Bar Association and approved by the Association in 1921 (46 Reports of American Bar Association, 1921, pp. 54, 311, 359) and 1922 (47 Reports of the American Bar Association, 1922 (pp. 53, 315). By authority of the Association, the bill was introduced in Congress in December, 1922 (S. 4214, H. R. 13522). It was not reported out of committee at that session, but certain amendments, not material here, were proposed and they were approved by the Association in 1923 (48 Reports of the American Bar Association, 1923, pp. 60, 302).

The bill was reintroduced in Congress in December, 1923 (S. 1005, H. R. 646). Hearings were held on January 9, 1924, by sub-committees of the House and Senate Committees on the Judiciary. The minutes of these hearings were printed by the government printing office for the use of the Committee on the Judiciary. The pamphlet carries no print number, but is entitled "Joint Hearings before the Subcommittees on the Judiciary, Congress of the United States, 68th Congress, First Session, S. 1005 and H. R. 646 * * * January 9th, 1924."

The bill as introduced was reported favorably by the House Committee (Report No. 96, 68th Congress, First Session) and was passed by the House in that form. Later the Senate Committee made certain amendments to which we shall have occasion to refer in our discussion of the law, and the bill was passed by the Senate and repassed by the House in this amended form. The bill, as passed by the House and showing the amendments made in the Senate, is printed in 68 Annual Reports of the Chamber of Commerce of the State of New York, 1925-1926, page 21.

Too great emphasis cannot be placed on the fact that the New York, New Jersey and United States acts were all drafted and passed on the demand of commercial organizations. More than one hundred and thirty-five trade

associations throughout the United States supported the United States Act, and their demand for its passage was sufficient to secure unanimous consent to consideration by the Senate. Subsequent statutes, based on the draft act prepared by the American Arbitration Association, modelled on the United States and the New Jersey acts, but containing improvements in form and the omission of certain technicalities to be found in those acts, have been adopted in a dozen additional states listed in paragraph 3 of the accompanying petition, all upon the demand of commercial organizations in the respective states.

The importance of this commercial support for the bills lies in the fact that it clearly evidences the fundamental underlying purposes of the statutes, in the light of which their detailed provisions must be construed. There can be no question that the legislative adoption of these statutes was intended to effectuate the wishes of their commercial sponsors. What the world of commerce wanted was a practical and effective instrumentality for the enforcement of arbitration agreements without regard to technicalities. They wanted a system which would work, and work efficiently. The statutes should be construed in the most liberal sense to effectuate this purpose, because they are remedial in nature.

## POINT I.

### The United States Arbitration Act is constitutional.

The Marine Transit Corporation attacks the constitutionality of the United States Act from three angles:

(1) As depriving the Federal courts of their judicial power,

(2) As conferring that judicial power upon laymen, and

(3) As enlarging the jurisdiction of the admiralty courts by conferring upon them the equitable power of specific performance.

The first two points have already been considered and disallowed by the highest courts in New York and Illinois in respect to the state arbitration statutes.

*Matter of Berkovitz* v. *Arbib and Houlberg,* 230 N. Y. 261, 274.

*White Eagle Laundry Co.* v. *Slawek,* 296 Ill. 240.

Although the state constitutional provisions under consideration are different than those of the federal constitution, we think that the principles involved are identical and that the decisions are persuasive. Under the New York Constitution, Article VI, Section 1, the Supreme Court is continued "with general jurisdiction in law and equity," and it was argued that the New York Act abridged this general jurisdiction. The New York court denied the validity of this argument and said in part:

> "Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist. The People, in establishing a Supreme Court to administer the law, did not petrify the law which the court is to administer * * *. The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce."

It then points out that the courts are still open to determine whether there is an agreement for arbitration and, if so, and after an award is rendered, to exercise jurisdiction to give whatever relief may be proper.

> "The situation is the same in substance as when effect is given to a release or to a covenant not to sue. Jurisdiction is not renounced, but the time and manner of its exercise are adapted to the convention of the parties restricting the media of proof. Long before the statute there was a like withholding of relief whenever the subject-matter of arbitration, instead of extending to all differences, was limited to some."

* * * * * * *

> "We are now asked to declare it [the common law rule] so imbedded in the very foundation of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions * * *. No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation." * * *

So in the Illinois case it was argued that the statute conferred judicial powers on individuals, and the court pointed out that the jurisdiction of the arbitrators flowed wholly from the voluntary agreement of the parties, and not from the statute at all. The statute conferred no new power, and took away no inalienable right, but simply recognized and enforced the agreement of the parties. It provided a procedural method for carrying out their contract, and nothing more.

We think that the decision of this court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, although it was concerned solely with a proceeding under the New York law, has a very direct bearing on the present argument. The elaborate review of authority in the majority opinion in that case recognizes the entire validity of arbitration agreements even prior to the statute, the fact that the only difficulty in their practical effectuation was a procedural one, and that these arbitration acts are procedural statutes, going solely to the remedy and not affecting substantive right. It recognizes the long-established rule, that under many circumstances arbitration agreements were enforceable by the courts, even without a statute. Thus it has always been the law that when the issues in a pending litigation were submitted to arbitration under a rule

of court, the parties were bound. There are innumerable cases to be found in the decisions in the United States courts where pending issues have been referred to arbitrators by agreement of the parties, and the federal courts have recognized the binding effect of the submission. See cases cited in *Red Cross* opinion, page 122, and

*Newcomb* v. *Wood,* 97 U. S. 581, 583.
*Hecker* v. *Fowler,* 2 Wall. 123.
*Houseman* v. *The North Carolina,* 15 Pet. 40, 45.
*Burrell* v. *U. S.,* 147 Fed. 44.
*Westall* v. *Avery,* 171 Fed. 626.
*Hannevig* v. *Sutherland & Co.,* 256 Fed. 445.
*Hastings* v. *Jones,* 18 Fed. (2nd) 833.
*New York & Cumberland R. R. Co.* v. *Myers,* 18 How. 246.
*Burchell* v. *Marsh,* 17 How. 344.

It is to be borne in mind that even executory agreements for arbitration were not invalid at common law, even though they were loosely said to be "void." The agreement was always as valid as any other term of a contract; the courts, for reasons of supposed public policy, denied enforcement, but an action would lie for damages for breach.

*Tobey* v. *Bristol County,* 3 Story 800, 819-826.
*Hamilton* v. *Home Insurance Co.,* 137 U. S. 370, 385-386.

The rule against enforcement found its origin in a dictum in an old English case, which itself is demonstrably unsound (see study in Cohen, *"Commercial Arbitration and the Law"*). The rule has been the subject of trenchant criticism by many judges. See comprehensive review in *U. S. Asphalt R. Co.* v. *Trinidad L. P. Co.,* 222 Fed. 1006.

The Arbitration Act is purely procedural in its nature. Article III of the Constitution vests the judicial power of the United States in the Supreme Court and such inferior courts as Congress may establish, and it need hardly be argued at this late day that Congress has plenary au-

thority over the procedure of those inferior courts. The statute declares (Sec. 2) that an agreement is valid, but this particular declaration is surplusage, because the agreement always was valid. The declaration creates no new substantive right. Beyond that, the statute merely provides a new and effective means for enforcing the agreement. In Section 3, it provides for the stay of actions brought in the federal courts in defiance of an arbitration agreement. Section 4 provides a summary procedure by which the court may decide whether or not an effective and binding arbitration agreement has been made. Section 5 provides for the appointment of an arbitrator by the court where the means agreed upon by the parties has failed to function or where they made no agreement as to the method of selection. Later sections empower the arbitrators to bring witnesses before them, and provide summary methods for enforcing, vacating, modifying or correcting the award and entering judgment thereon. Section 8 provides for the application of the other provisions in the act after an ordinary admiralty proceeding has been commenced.

The petitioner's contention that the act deprives the District courts of power to determine the merits of causes, that they are made merely ministerial officers to give effect to the award of a non-judicial body, that the only power given to a court is to set the award aside for fraud under Section 10, and that an admiralty court cannot set it aside for any reason under Section 8, are all unfounded. If the courts lose power to determine the merits of the case, it is because of the agreement of the parties, and not of the statute—just as they lost power when there was a submission by parties to a pending litigation. The power of the court is not limited to setting aside the award, but it extends to determine whether there was a valid agreement for arbitration, and whether there has been a default under it, and whether the parties are bound to arbitrate. The duty of the courts in passing upon an award is not ministerial, but is judicial in the fullest sense—Section 10 codifies and extends the well-established

common law which limit judicial review of the arbitration proceedings and the award to fundamental denials of justice. While the entry of a decree of an admiralty court under Section 8 is procedurally different from the motion to confirm under Section 9, it is perfectly obvious that the decree is not to be entered if grounds exist for vacating the award under Section 10.

The statute does not impair, but on the contrary makes more effective, the jurisdiction of the courts. It gives a party his day in court as to the existence of an arbitration agreement, his performance thereunder, and the propriety of the award.

The Constitution was never intended to and has never been construed to solidify the procedure which existed in 1789. Indeed, it did not even solidify substantive rights. The courts exist as a practical means for the enforcement of rights. All the statute does here is to give a more effective method for enjoyment of the right which the parties have by their own agreement created.

Turning to the argument that the act enlarges the jurisdiction of the admiralty courts by conferring upon them the equitable power of specific performance, it is to be observed that the Constitution has again left Congress free to make such improvements in admiralty procedure as it deems fit. The only constitutional limitation upon the the power of Congress to legislate in respect to admiralty is this: That it cannot extend the power of an admiralty court beyond that subject matter which was traditionally within the jurisdiction of admiralty—that is, it cannot under pretence of regulating the law of admiralty reach out and seize additional jurisdiction which the Constitution left exclusively with the states. But Congress may and frequently has modified admiralty procedure.

In the very early case of *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 460, this court declared:

> "The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

Even changes in substantive admiralty law by Congress have received the full approval of the courts.

*Southern Pacific Co.* v. *Jaensen,* 244 U. S. 205, 215.

*The Lottawanna,* 21 Wall. 558.

*The Gansfjord,* 25 Fed. Rep. (2nd) 736, affirmed 32 Fed. (2nd) 236.

*Stoffel* v. *W. J. McCahan Sugar Refining & Molasses Co.,* 35 Fed. (2nd) 602, affirmed 41 Fed. (2nd) 651.

In the very case cited by the petitioner, *The Lottawanna, supra,* this court said:

> "But we must always remember that the court cannot make the law; it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the Legislative Department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry enrollment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of ship owners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime."

The citations given by the petitioner in support of the argument that Congress has no power to enlarge the jurisdiction of the admiralty court are in no way applicable to the statute now under review. The determination of the "true limits of maritime law and admiralty jurisdiction," which is "exclusively a judicial question" (Petitioner's Brief, p. 16) refers to the subject matter over which the federal courts are, by the Constitution, given jurisdiction. It does not in any way affect or concern the power of Congress to regulate the procedure of the federal courts in dealing with admiralty matters properly within their jurisdiction. Neither that decision nor any other cited by petitioner gives any support to its assertion that the practice and procedure of federal courts in admiralty must forever remain just as it was at the time of the Constitution, without regard for changing conditions or the demands of justice.

As a matter of fact, it is a misnomer to say that the statute directs the specific performance of the arbitration agreement. The term is convenient, but misleading. What the statute does under Section 4 is to provide that the court shall find whether a valid arbitration agreement exists, applicable to the disputes presented, and under Section 5 it is to aid the parties by the appointment of an arbitrator, if that becomes necessary. But no specific enforcement is granted in the ordinary sense that a recalcitrant party is forced to do something which he is unwilling to do. Even after an order of the court, he need not participate in the arbitration if he chooses not to. The court merely puts its stamp of approval upon the alleged obligation to arbitrate, and declares that an arbitration held pursuant to its terms shall be binding. No specific action on the part of the respondent is ever required. The formula of the statute that "the court shall make an order summarily directing the parties to proceed with the arbitration" is at variance with the legal effect of the order. A party is still at perfect liberty to refuse to appear before the arbitrators. He cannot be cited in contempt; he cannot be brought before the arbitrators unless by virtue of entirely independent process—a subpoena. An order in such an instance merely validates an *ex parte* proceeding before the arbitrators.

In this connection we call attention to Section 4-a of the New York statute, adopted by the New York legislature to correct the decision of the New York Court of Appeals in *Matter of Bullard* v. *Grace Co.*, 240 N. Y. 388, and to reinstate the original purpose of the act. The section was approved by the New York Court of Appeals in *Matter of Finsilver, Still & Moss* v. *Goldberg, Mass & Co.*, 253 N. Y. 382. If the agreement of the parties provides a means for setting up the arbitral tribunal without action of the parties themselves, *e. g.*, appointment of the arbitrators by another person or body, there is no need to resort to the court at all prior to the arbitration, but on a motion to confirm or vacate the award, the court may still

consider whether there was a duty to arbitrate. The proceeding under Section 4 of the act is merely a convenient means for the *advance* determination of the duty to arbitrate, but is not a necessary one.

## POINT II.

**The United States Arbitration Act is applicable to this case.**

In Point VI of its brief, the petitioner argues that the jurisdiction of an admiralty court to enforce an arbitration agreement under the United States statute is limited to case involving foreign commerce, and that the present case involved intrastate commerce only. As authority for its first proposition it cites

*Zip Manufacturing Co.* v. *Pep Manufacturing Co.*, 44 Fed. (2nd) 184.

The Circuit Court of Appeals held that foreign commerce was involved in this case (p. 244). We shall not argue that question because it is not one which affects the general construction of the statute.

Assuming, however, that this court should disagree with the decision below, we submit that the construction of the United States statute urged by the petitioner and declared in the District Court in the *Zip* case, *supra*, is erroneous. We are not concerned here with the question whether the decision in the *Zip* case is right to the extent that it holds the act limited to commercial disputes and not applicable to patent disputes, but only with its broader decision that the act is limited by Sections 1 and 2 to agreements for arbitration of controversies arising out of foreign or interstate commerce or admiralty questions in foreign commerce.

The act rests upon two independent bases: first, the constitutional power of Congress to prescribe procedural mat-

ters for the federal courts, and secondly, the constitutional right to regulate matters of admiralty and interstate and foreign commerce. The two are independent. If a controversy is within the jurisdiction of the federal courts and if there was an agreement for arbitration thereof, it is to be enforced, whether or not it involves interstate or foreign commerce or a maritime transaction. This is clear from the provisions in the act itself, from its history, and from the report of the House Committee relating to the bill.

In the act as it was finally passed by Congress, Section 3 declares that *any* suit or proceeding brought in any federal court upon any issue referable to arbitration "under *an* agreement in writing for such arbitration" may be stayed. Under Section 4, a party aggrieved by a refusal to arbitrate "under *a* written agreement for arbitration" may petition any federal court "which, save for such agreement, *would have jurisdiction* under the judicial code of law, in equity, or in admiralty of the *subject-matter of a suit arising out of the controversy* between the parties" for an order directing arbitration to proceed. Under Section 7 arbitrators selected "either as prescribed in this act *or otherwise*" may subpoena witnesses. Under Section 8 "a cause of action *otherwise justiciable in admiralty*" entitles the party to bring his proceeding by libel, etc., and then to invoke the provisions of the act in respect to enforcement of the arbitration agreement and to have a decree entered on the award.

These sections, read without reference to Sections 1 and 2, would clearly indicate the purpose to prescribe rules of procedure for the federal courts applicable to any case where the federal jurisdiction would normally attach by reason of diversity of citizenship or otherwise.

It is suggested that doubt is thrown on this broad construction of the statute by reasons of Sections 1 and 2, which declare the validity, irrevocability, and enforceability of agreements "in any maritime transaction or a contract evidencing a transaction involving commerce,"

which terms, by definition, are limited to matters within admiralty jurisdiction and to interstate and foreign commerce. It is said that these two sections limit the whole act.

This construction is not reasonable, even on the face of the act itself. Of course, statutes are ordinarily to be read as a whole, and each section is to be interpreted with other sections in mind. But the result of limiting Sections 3 and 4 of this statute by Sections 1 and 2 leads to such results that it cannot have been the congressional purpose. It is necessary only to observe the practical operation of the narrow construction.

In New York and New Jersey, written agreements for arbitration are enforceable, whether they relate to intrastate or interstate commerce. Now, if an agreement concerning intrastate commerce is made between two residents of New York or two residents of New Jersey, it will be enforced in the state courts. The same agreement concerning interstate commerce will be enforced in the state courts. Or, in the latter case, a proceeding to enforce arbitration may probably be brought in the federal court, by virtue of Section 24 of the Judicial Code (U. S. Code, Title 28, Sec. 21), subdivisions (1) and (8), because it arises under the laws of the United States, and under a law regulating commerce, i. e., the United States Arbitration Act, and diversity of citizenship is not a prerequisite. If the agreement is between a citizen of New York and a citizen of New Jersey, and involves interstate commerce, it may still be enforced in either the New York, New Jersey or United States courts. But if it is between a citizen of New York and a citizen of New Jersey, but involves intrastate commerce only (*e. g.*, two corporations, both doing business in New York), then it is enforceable in the New York or New Jersey courts, but if it be removed to the federal court on the ground of diversity of citizenship, then the arbitration clause will be ineffective and unenforceable under this narrow construction of the act, because no interstate commerce is involved.

We suggest that Congress could have had no such intention. The statute is remedial and is entitled to a broad and liberal construction. It was passed upon the urgent and widespread demand of commercial interests and was intended to serve the purpose of those commercial interests. It was a part of a general national scheme for the furtherance of arbitration and is so to be construed as to supplement the state laws in matters of federal jurisdiction. The situation just discussed indicates the gap which would exist in the effectuation of the purpose behind the act if the narrow construction urged by the appellants were given to it.

Is it not unreasonable to say that Congress would have declared a new public policy relating to the enforcement of arbitration agreements, and yet would have drawn a line between that public policy as applied to interstate commerce and admiralty and as applied to identical intrastate disputes which came into the federal courts by reason of diversity of citizenship? Is it not even more unreasonable to suppose that Congress would have done this when the omission as to intrastate commerce would have offered a loophole to parties to escape from applicable state laws identical in principle with the federal law by removing the proceeding from the state to the federal court on the ground of diversity of citizenship? Lastly, since the statute is primarily a procedural one, is it not to be expected that it was so drawn as to effectuate the congressional power over procedure in the federal courts, and would it not be reasonable to expect that Sections 1 and 2, directed to interstate commerce and admiralty proceedings, were intended to extend the act rather than to limit it?

It may be argued that if the broader construction is given, and Sections 3 *et seq.* are construed to be directed to all cases otherwise within the jurisdiction of the federal courts, then Sections 1 and 2 would be wholly unnecessary and would be surplusage. This is not so. There is independent reason for Sections 1 and 2. The case supposed above concerns citizens of New York and New Jersey,

where there are modern arbitration statutes. Now assume a case arising between a citizen of Illinois and a citizen of Missouri, where clauses for the arbitration of future disputes are still unenforceable, involving interstate commerce, and a sum exceeding $3,000. Because of the diversity of citizenship, the case could be brought into the federal courts and the arbitration clause would be enforceable under the United States Act. But suppose that the case arose between two citizens of Illinois, but involved interstate commerce between Missouri and Illinois. Without Sections 1 and 2, it could not be brought into the federal courts at all, because there is no diversity of citizenship, nor would it arise under a law of the United States, or under a law regulating commerce. By inserting Sections 1 and 2, however, the act has extended the jurisdiction of the federal courts so that where interstate commerce disputes are concerned, the mere existence of an arbitration clause gives jurisdiction to the federal courts and thereby supplements the provisions of Section 3 *et seq.*, which provide for the enforcement of arbitration clauses where there is diversity of citizenship.

This is the construction of the act suggested by the Circuit Court of Appeals, Second Circuit, in

*In Re Woerner*, 31 Fed. (2nd) 283, 284.

The argument for the broad construction of the statute need not be rested solely upon the intention of Congress as spelled out from the provisions of the act itself. The record of congressional proceedings in connection with the passage to the act affords conclusive support for the broad construction.

In the *Zip Manufacturing* case, *supra*, the district judge concluded, on the strength of the amendments made in the Senate, that the act was limited to agreements in interstate commerce and admiralty. Apparently his attention was not called to the Committee hearings and to the House Committee report, which throw a wholly different light on the meaning of the statute.

We have already referred to the minutes of the Joint Hearing before the Subcommittees of the Committees on the Judiciary, 68th Congress, First Session on S. 1005 and H. R. 646, January 9, 1924, as printed for the use of the Committees on the Judiciary. A large number of proponents of the bill appeared at that hearing. The character of the bill as a general regulation of procedure in the federal courts was called to the Committees' attention. For instance, on page 17, Mr. Cohen was speaking of the defects under the common law, and the correction of these defects in New York by the New York statute. Then he said:

> "But it cannot be done under our constitutional form of government and cover the great fields of commerce until you gentlemen do it, *in the exercise of your power to confer jurisdiction on the federal courts. The theory on which you do this is that you have the right to tell the Federal courts how to proceed.* And you say to the judge: 'You used to hold that these things were not good; now they are good. You used to say you did not have jurisdiction; now you have jurisdiction.' That is all there is to it." (Italics ours.)

On page 30, speaking for the New Jersey State Chamber of Commerce, Mr. Vance said:

> "The reasons for endorsing a federal measure have been well put forward here, and I need not dwell upon them at length. But we are so enthusiastically in favor of it, that we feel that we can ask in a modest way the Congress *to extend this principle to the federal jurisdiction.*" (Italics ours.)

A brief prepared by the present counsel for *amici curiae* was also submitted to the sub-committees and is printed as part of the report. In it we said in part:

> "It has been suggested that the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. *This is not the fact.*

"The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. *It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts.* So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power. This principle is so evident and so firmly established that it cannot be seriously disputed.

"A federal statute providing for the enforcement of arbitration agreements *does relate solely to procedure of the Federal courts.*

* * * * * *

"So far as the present law declares simply *the policy of recognizing and enforcing arbitration agreements in the Federal courts* it does not encroach upon the province of the individual States. It seems probable, however, that Congress has ample power to declare [*in addition*] that all arbitration agreements connected with interstate commerce or admiralty transactions shall be recognized as valid and enforcible even by the State courts. In both cases the Federal power is supreme. Congress may act at its will, and having acted, no law or regulation of a State inconsistent with the congressional act can be given any force or effect even in the courts of the State itself. They are as much bound to carry out the provisions of such a Federal statute as though it was an act of their own legislature.

* * * * * *

"Even if, however, it should be held that Congress has no power to declare generally that in all contracts relating to interstate commerce arbitration agreements shall be valid, *the present statute is not materially affected.* The *primary* purpose of the statute is to make enforcible *in the Federal courts* such agreements for arbitration, *and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts*" (pp. 37-38). (Italics and bracketed matter ours.)

The House Committee on the Judiciary, supporting the bill, submitted a report to accompany it (Report No. 96, 68th Congress, First Session) in which they said in part:

> "The purpose of this bill is to make valid and enforceable, agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, *or which may be the subject of litigation in the federal courts.* It was drafted by a committee of the American Bar Association and is sponsored by that Association and by a large number of trade bodies whose representatives appeared before the committee on the hearing. There was no opposition to the bill before the committee.
>
> "The matter is properly the subject of federal action. *Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought,* and not one of substantive law to be determined by the law of the forum in which the contract is made. *Before such contracts could be enforced in the federal courts, therefore, this law is essential.* The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded *also* upon the federal control over interstate commerce and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce. * * *
>
> "In view of the strong support of commercial and legal bodies, the entire lack of opposition before the committee, the obvious justice of the result sought to be attained, and the evident propriety and necessity of federal action, we submit that the bill should become law. It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." (Italics ours.)

The Senate Judiciary Committee in reporting out the bill proposed certain amendments. The following shows the material portions of the bill and the amendments made to them, the bracketed matter being omitted in the amendment and the italicized matter added:

"A BILL.

"To make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

* * * * * *

"SEC. 2. That a written provision in any [contract or] maritime transaction or *a contract evidencing a* transaction involving commerce to settle by arbitration a controversy thereafter arising [between the parties] out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * * * * *

"[SEC. 8. That if the basis of jurisdiction be diversity of citizenship between citizens of several States or one of the parties be a foreign State, citizen, or subject, the district court or courts which would have jurisdiction if the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000, shall have jurisdiction to proceed hereunder notwithstanding the amount in controversy is unascertained or is to be determined by arbitration.]"

The omission of the words "contract or" in Section 2, and the elimination of Section 8, could not have been intended to change the whole theory and basis of the act, and to exclude the procedural regulation of the federal courts to which the act had been primarily directed, and

limit it to interstate and foreign commerce and to admiralty in the field of foreign commerce. It should be said that these amendments were made in the Senate Judiciary Committee after the public hearings and without consultation with the sponsors of the bill.

It may well have seemed to the Senate Committee that the words "contract or" in the first line of Section 2 were needless and inappropriate. Obviously the congressional power generally to declare the validity and enforceability of arbitration agreements was limited to those fields where exclusive jurisdiction was conferred on Congress, such as interstate commerce and admiralty. And a general declaration that arbitration clauses in "any contract" should be valid might have seemed an attempt to invade the field reserved for the states. We believe, therefore, that the change was intended merely as an improvement in phraseology. If it had been intended to change the entire scope of the act, the Committee certainly would have eliminated the general term "contracts" as it appeared in the title and as it appears again in the second half of Section 2, "an agreement in writing to submit to arbitration an existing controversy arising out of such *contract*, transaction or refusal * * *."

So as to Section 8, the evident reason for eliminating it was the fear that cases brought into the federal court on the ground of diversity of citizenship might swamp the courts, if the $3,000 limitation was removed. But there is no evidence that it was thereby intended to cut out diversity of citizenship as a basis of jurisdiction when the jurisdictional amount was present.

That this was the understanding of the sponsors of the act is evident from the letter written by the chairman of the Committee on Commerce, Trade and Commercial Law to Senator Walsh (49 Reports of the American Bar Association, 1924, pp. 283-284). Mr. Piatt says in part:

> "The provision [as amended] in Sec. 2 * * * meets entirely with our concurrence and we think it is a considerable improvement in the language of the legislation. * * *

"Your suggestion that Section 8 be deleted so as to preserve the limitation on the jurisdiction of the federal courts, where the basis of jurisdiction is diversity of citizenship, namely, that the controversy shall involve, exclusive of interest and costs, the sum of $3000, seems to us to deprive the smaller claimants in arbitration cases of the opportunity to resort to the courts, which it would seem desirable they should have, as well as those involved in larger matters. We are, however, aware that there is considerable reluctance on the part of Congress to increase the jurisdiction of the federal courts, and if it be the view of your committee at this time that it is undesirable to include in the provisions, controversies involving less than $3000, we should be willing to approve of a limitation of $1000, and we trust that this will meet with your concurrence." (Bracketed matter ours.)

## POINT III.

**Section 8 of the act authorizes arbitration as part of a suit in admiralty, and authorizes the admiralty court to enter its decree upon the award without reference to the provisions of Section 9.**

Section 8 of the act provides:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

Section 9 provides that "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court," then an application may be made to that court for an order confirming the award.

The petitioner has argued in Points IV and V that Section 8 is applicable only to proceedings *in rem,* and that as there was no provision in the present arbitration clause for the entry of judgment on the award, as required by Section 9, there could be no confirmation under Section 8. We submit that the argument ignores the obvious purpose of Section 8.

The general theory of the federal and the state acts is that arbitration is a means for the settlement of disputes, alternative to litigation, and it is held that a party who commences an action thereby waives his right to arbitration. The result of this rule in the state courts has been that a party was denied the right to attach property as security for an award which might be rendered, or to commence proceedings to establish a mechanic's lien, etc. See, as an example, *Matter of Young* v. *Crescent Development Co.,* 240 N. Y. 244, 249. Section 8 was intended to preserve the right of a party to libel a vessel or other property without waiving his right to proceed under the arbitration clause. His right to arbitration was to be protected, but he would be able to secure the additional protection of the property seized.

It may be conceded that parties cannot take advantage of Section 8, unless they have a right to libel a vessel or other property. But we cannot believe that a serious argument is made that once a libel has issued or once there is jurisdiction *in rem,* the proceeding *in personam* must be separated—in effect—if advantage is to be taken of an arbitration agreement relating thereto. This would stultify the whole purpose of Section 8, which is to assure the party of his right to libel and then as part of, and incidental to, the admiralty proceeding to give him such right to arbitration as his agreement may provide. It is somewhat difficult to see how he would ever have an agreement for arbitration with the boat or other property libeled; the agreement must necessarily be with a party sued *in personam.*

But Section 8 is very clear in its declaration that when the admiralty proceeding has been commenced by libel, the arbitration is to be ordered as a part of the proceeding and the court "shall retain jurisdiction." Doubtless the provisions of Sections 4 to 7 and 10 to 11 are in most respects applicable to the subordinate arbitration proceeding which becomes a part of the main admiralty suit. But it does not alter the fact that under Section 8 the arbitration is within the confines of the admiralty suit and is not such an independent proceeding as that commenced under Section 4.

The point has not been expressly decided, but see expressions in:

*The Volsinio,* 32 Fed. (2nd) 357, 358; aff'd on an independent ground in *Ex Parte De Simone,* 36 Fed. (2nd) 773.

*The Fredensbro,* 18 Fed. (2nd) 983, 985.

*Danielsen* v. *Entre Rios Rys. Co.,* 22 Fed. (2nd) 326.

This analysis answers the further contention that the court could not enter its decree upon the award because there was no express agreement for the entry of judgment such as is required by Section 9. The act very clearly shows that the procedure under Section 8 and Section 9 are wholly different.

It is quite true that in the ordinary case parties who seek confirmation of an award must have agreed for the entry of judgment on the award before they can proceed under Section 9. The language is unfortunate. It is to be found in none of the state acts except in the provisions which have survived from the old New York statute. Undoubtedly it crept into the federal act through oversight. Nevertheless, it is there. But although it applies generally to the confirmation of awards, it is not applicable to proceedings under Section 8.

Where the ordinary arbitration agreement is concerned, a separate proceeding is brought to enforce it under Section 4. The enforcement is granted whether or not there is a provision for the entry of judgment. After the parties secure their award they must take steps to enforce it. If they have agreed for the entry of judgment, they do so by a summary motion to confirm; if not, then they must bring a separate action on the award in which the merits of the original dispute will not be reviewed, but the court will determine whether the award was properly rendered. Even if there was a pending action and that action was stayed under Section 3, the arbitration proceeding does not become a part of the action and within the jurisdiction of the court.

But Section 8 proceeds on a different theory. In substance, it treats the arbitration as if it were an arbitration under a rule of court in a pending action. The parties start the action and libel the property. Then they proceed to arbitration. The award is rendered. They are entitled to enforce the award by action, but the action is already pending. There is no need, then, to secure an order for confirmation because the appropriate procedure is to apply to the court which already has jurisdiction of the case, and under whose auspices the arbitration is held, for entry of a decree upon the award.

Doubtless the respondents in this case would have been more correct if they had moved for entry of a decree upon the award, rather than for "confirmation" thereof. But the record shows that they made their motion in the original action and "upon the pleadings and proceedings heretofore had," and that they asked for "such other and further relief," etc. (p. 167). The error, therefore, was merely a matter of terminology.

## POINT IV.

**An award by a majority of the arbitrators is sufficient.**

The petitioner argues in its Point VIII that a unanimous award is necessary under the United States Act, and hence the present award is invalid because only four out of five of the arbitrators signed it.

Unlike the great majority of the modern arbitration statutes, the New Jersey and the Federal acts do not expressly provide that majority awards shall be valid. But it is common commercial practice that majority awards shall be recognized, and it is difficult to believe that unanimity was intended to be required by these statutes. Where the common practice prevails that each party shall nominate one arbitrator, who in turn select a third, there is very likely to be a dissent on the part of the arbitrator nominated by the losing party, and a requirement of unanimity would render abortive a large number of arbitrations. It is not likely that Congress adopted an act clearly intended to effectuate commercial demand, yet left a limitation which would materially impair its value.

We suggest that the answer in this case is to be found in the charter of the New York Produce Exchange, before one of whose committees the arbitration was held. The Produce Exchange was incorporated by Chapter 359 of the Laws of New York, 1862, under the name of "The New York Commercial Association." Section 5 of the statute provides for an Arbitration Committee and for the entry of judgment upon awards made by it, and Section 7 declares that "any number not less than a majority of all the members of the Arbitration Committee shall be competent to meet together to hear the proofs and allegations of the parties, and an award by a majority of those who shall have been present at the hearing of the proofs and allegations shall be deemed the award of the Arbitration Com-

mittee * * *." Hence three of the five members could conduct the proceeding and two of the three could make a binding award. Section 5 was amended by Chapter 291 of the Laws of New York, 1912, by which time the Association was known by its present name as the New York Produce Exchange. This amendment extended the power of the Committee so that it might hear arbitrations with non-members as well as members.

It is quite true that in this case the agreement was for arbitration not before the Arbitration Committee of the Produce Exchange, but before its Committee on Grain (p. 156). But the reason why the Grain Committee was chosen instead of the Arbitration Committee is fully set forth in the record (p. 205 *et seq.*). The Canal Carriers Association believed that the members of the Arbitration Committee were not experienced in these questions of grain shipments and wanted the Grain Committee to act because its members had the necessary experience. We suggest that the substitution of the Grain Committee for the Arbitration Committee was intended purely to affect the personnel of the arbitrators, and was not intended to make any change in their authority, and hence that it was the specific intention of the agreement that a majority award should be sufficient.

Leaving aside the special effect of the Produce Exchange charter in this case, it is unreasonable to suppose that Congress ever intended that a unanimous award should be required under the statute, unless there was a specific agreement therefor. The practical considerations under the statute and under the common law are strikingly different. When common law awards came before the courts they were the result of a formal submission of an existing dispute to arbitration. These submissions were usually instruments of some considerable detail. They prescribed the exact dispute between the parties. They named all the arbitrators. Frequently, if not usually, they prescribed certain elements of procedure for the arbitration. They contained provisions against revo-

cation and that the parties would abide by the award. With such formal agreements it was a simple matter for the parties to provide expressly for a majority award, if that was their purpose.

But under the statute, the practical connotations of the system are wholly different. It is not merely that brevity is now essential—brevity in a clause included in a larger contract and applicable to future disputes—"Dried Fruit Association arbitration," or similar provisions which are sufficient as between the parties to carry their entire meaning. The essential point to-day is that the law approves agreements for the arbitration of future disputes arising out of a contract; that the statute was passed to further the interests of the business world, to put the approval of the law upon their practices; and that business men insert these clauses providing for arbitration, knowing perfectly well what ordinary arbitration comprises, but not knowing the requirements of various statutes or special principles of law requiring special safeguarding clauses. Arbitration under the federal act will never be a successful and a practical system, if men are required to add express provision for majority award. Majority awards are the consistent practice of the business world; business men believe them to be one of the normal elements of arbitration. Congress could not have intended to leave such a serious gap in the effectuation of the act. If the construction for which the petitioner contends is given to the act, it will render abortive a large number of awards on a purely technical point—a point of which the complaining party never thinks until he has lost the case.

In this aspect, the practice and the rules of the common law ought not to control. We believe it the necessary conclusion from the circumstances under which the act was adopted that a majority award was intended to be valid.

## CONCLUSION.

**The decree of the lower court, upholding the validity of the award in this case, should be affirmed.**

Dated, November 23, 1931.

Respectfully submitted,

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KENNETH DAYTON,
Counsel for the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., *amici curiae.*

BURTON A. ZORN,
with them on the brief.

# SUPREME COURT OF THE UNITED STATES.

No. 172.—October Term, 1931.

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|---|---|
| Marine Transit Corporation and Tug "Gerald A. Fagan," by Marine Transit Corporation, Claimant, Petitioner, *vs.* Louis Louis Dreyfus and Charles Louis Dreyfus, etc. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[January 4, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The petitioner, Marine Transit Corporation, entered into a written booking agreement with the respondents, Louis Dreyfus & Company, to furnish insurable canal tonnage for about 200,000 bushels of wheat, to be carried from Buffalo to New York. The contract provided that it should be "subject to New York Produce Exchange Canal Grain Charter Party No. 1 as amended". That charter party contained the following provision as to disputes:

"All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding."

Under this contract, the Marine Transit Corporation, in September, 1928, provided the barge "Edward A. Ryan" to carry 19,200 bushels of the above-stated amount. This was a shipment, as the bill of lading of the Marine Transit Corporation shows, to the order of the Bank of Nova Scotia and was from Fort William, Ontario, 'in bond, for export', to be delivered 'on surrender of original Lake bill of lading properly endorsed'. While in tow of the petitioner's tug "Gerald A. Fagan" on the New York Barge Canal, and approaching the Federal lock at Troy, the "Edward A. Ryan" struck the guide wall and sank with its cargo. The respondents, Louis Dreyfus & Company, filed a libel in admiralty against the Marine Transit Corporation *in personam*,

and against the tug "Gerald A. Fagan" *in rem*, to recover damages for the loss of the wheat. The libel was also against a barge "John E. Enright", one of the boats in the tow, but the action as to that boat was subsequently discontinued. A claim for the tug "Gerald A. Fagan" was made by the Marine Transit Corporation and a stipulation for value was filed by it, as claimant, in the sum of $26,000, with the usual provision that the stipulation should be void if the claimant and the stipulator (the Continental Casualty Company) should abide by all orders of the court and pay the amount awarded by its final decree, and that otherwise the stipulation should remain in full force.

After answer to the libel had been filed by the Marine Transit Corporation as respondent, and as claimant of the tug "Gerald A. Fagan", the libellants moved for a reference of the dispute to arbitration in accordance with the provision of the booking contract. This motion was granted "only as to the issues raised by the contract between the libellants and the Marine Transit Corporation", and the latter was ordered to submit to arbitration as to these issues before the Committee on Grain of the New York Produce Exchange. The arbitration proceeded and resulted in an award against the Marine Transit Corporation for the sum of $23,016, with interest and the costs and expenses of the arbitration. The award was confirmed by the District Court and an order —in substance, a final decree—was entered for the recovery by the libellants against the Marine Transit Corporation of the amount of the award, with the further provision that if payment was not made within ten days, execution should issue against the Marine Transit Corporation and the stipulator. A motion to restrain the libellants from recovering from the claimant or its stipulator on behalf of the tug "Gerald A. Fagan" was denied. The decree entered upon the award was affirmed by the Circuit Court of Appeals (49 Fed. (2d) 215) and the case comes here on writ of certiorari.

There is no question that the controversy between the petitioner and the respondents was within the arbitration clause of the booking contract. That provision was valid (*Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, 122), and, as it related to all disputes arising under the contract, it applied to the controversy with the Marine Transit Corporation as operating owner of the tug "Gerald A. Fagan" which was used for the agreed

transportation. The questions presented are (1) whether the action of the District Court was authorized by the United States Arbitration Act,[1] and (2) whether that Act, as thus applied, is constitutional.

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[1]Act of February 12, 1925, c. 213, 43 Stat. 883. The title of the Act and Sections 1 to 4, inclusive, and sections 6, 7, 8, a portion of section 9, and sections 13 and 14 are as follows:

"CHAP. 213.—An Act To make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That 'maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3.. That if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

"Sec. 4. That a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the

*First.* In construing the statute, we deal only with the questions raised by the present record. The loss occurred upon a waterway which was part of the navigable waters of the United States (*The Robert W. Parsons,* 191 U. S. 17) and while the cargo

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parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: *Provided,* That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

"Sec. 6. That any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

"Sec. 7. That the arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, [illegible] majority of them, and shall be directed to the said person and [illegible] served in the same manner as subpoenas to appear and testify before [illegible] rt; if any person or persons so summoned to testify shall refuse or neglect to obey

was being transported by the petitioner under a maritime contract. The subject matter of the controversy thus lay within the jurisdiction of admiralty. The ambiguities of the statute have been stressed in argument, but we think that its provisions embrace a case such as the one before us[2] and it is not necessary to

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said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

"Sec. 8. That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

"Sec. 9. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

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"Sec. 13. That the party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

"(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

"(b) The award.

"(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

"The judgment shall be docketed as if it was rendered in an action.

"The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

"Sec. 14. That this Act may be referred to as 'The United States Arbitration Act.'".